UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VERIZON NEW YORK INC. and LONG ISLAND LIGHTING COMPANY d/b/a LIPA,

CV-11-0252 (LDW)(AKT)

Plaintiffs,

-against-

THE VILLAGE OF WESTHAMPTON BEACH, THE VILLAGE OF QUOGUE and THE TOWN OF SOUTHAMPTON,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND FOR PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

Verizon and LIPA intend to divert public utility poles located on public rights of way in the Village of Westhampton Beach to a purely private and religious purpose. By allowing the East End Eruv Association ("EEEA") to attach 15-foot-long symbolic religious implements called *lechis* to its poles, Verizon and LIPA will convert those utility poles into religious symbols that delineate the boundary of a religious domain called an *eruv*. Franchise agreements that govern the poles in question and New York State laws that govern Verizon and LIPA restrict the poles to public use that benefits the community at large and prohibit the public utilities from sublicensing their poles for such private purposes.

Even if Verizon and LIPA have the authority to issue such licenses, the Establishment Clause of the First Amendment bars them from doing so.[1] An *eruv* is a religious creation with an exclusively religious purpose and effect. It allows certain religiously observant Jews who believe in the power of the *eruv* to attend synagogue and carry on the Jewish Sabbath where their faith would otherwise prohibit them from doing so. The *eruv* has no secular meaning. To a certain segment of observant Jews who believe in the *eruv*, it will, from its public property location, communicate a religious message. To everyone else, it will announce that Verizon, LIPA, and the Village have placed their imprimatur on one particular form of religiously observant Judaism, one set of religious interpretations and practices, one particular religion over all others. The stark reality is that the erection of *lechis* on public property to create an *eruv* lacks any valid secular purpose, has the primary effect of advancing religion, fosters excessive

[1] The Village of Westhampton Beach undeniably has a compelling state interest in avoiding and preventing Establishment Clause violations. See Bronx Household of Faith v. Bd. of Educ. of City of New York, 650 F.3d 30, 40 (2d Cir. 2011) cert. denied, 132 S. Ct. 816 (U.S. 2011).

state entanglement with religion and constitutes government endorsement of religion, all in violation of Lemon v. Kurtzman, 403 U.S. 602 (1971), and the Establishment Clause.[2]

Because Verizon and LIPA's plan to erect *lechis* falls outside their lawful authority and offends the Establishment Clause, the Village is entitled to summary judgment on its counterclaims in this action. Verizon and LIPA's claims for declaratory relief seek the opposite declaration, *i.e.*, that the placement of lechis is permissible, and are, therefore, subject to dismissal as well.

Finally, the Court should issue a preliminary injunction to maintain the status quo by prohibiting Verizon and LIPA from acting outside their lawful authority and in contravention of the Establishment Clause by issuing licenses for the attachment of *lechis* on public property.

STATEMENT OF FACTS

The Village respectfully refers the Court to its Rule 56.1 Statement of Undisputed Material facts for a full recitation of the facts relevant to this motion.

[2] Defendant's Establishment Clause argument relates solely to the use of public property for the placement of *lechis*. Nothing prevents Orthodox Jews from acquiring or using private property for the placement of lechis. Neither the EEEA nor anybody else claims that an *eruv* is invalid unless its *lechis* are located on public property.

ARGUMENT

POINT I: LIPA AND VERIZON DO NOT HAVE THE AUTHORITY TO ISSUE LICENSES TO A PRIVATE ENTITY TO ATTACH ITEMS TO THE UTILITY POLES FOR PRIVATE PURPOSES

LIPA and Verizon have entered into agreements to allow EEEA, a private entity, to attach items to their utility poles in Westhampton Beach for private purposes. These agreements violate New York State law, which provides that the streets in Westhampton Beach can only be used for public or municipal purposes and for the benefit of the general public. Additionally, the poles are subject to license agreements that prohibit Verizon and LIPA to from sublicensing their poles for a private purpose. The utilities thus are barred from granting a sublicense to the EEEA allowing it to attach items to their utility poles for private and religious purposes.

A. Verizon and LIPA Utility Poles are Under the Control and Supervision of Westhampton Beach

LIPA and Verizon have constructed poles and other utility structures within the street right-of-way of the Village of Westhampton Beach. They are under jurisdiction and control of the Village. The State's function in regulating its streets originates from early English common law, and the State has delegated to all villages in the State the exclusive control and jurisdiction of the streets and public grounds located within a village pursuant to Article IX, § 2(c)(6) of the New York State Constitution, § 10 of the Municipal Home Rule Law and § 6-602 of the Village Law[3]. See New York State Pub. Employees Fed'n, AFL-CIO by Condell v. City of Albany, 72 N.Y.2d 96, 100-101 (1988). The trustees of a village " … hold the fee of streets for the benefit of the whole people, it follows that residents of a particular area … do not possess and cannot be granted proprietary rights to the use of the highways … in priority to or exclusion of use by the

[3] The state has delegated to villages the exclusive control and supervision of the streets and public grounds since at least 1897. Hungerford v. Vill. of Waverly, 125 A.D. 311, 315 (3rd Dep't 1908).

general public." People v. Grant, 306 N.Y. 258, 262 (1954). The "public right" to use the streets is "absolute and paramount." See New York State Pub. Employees Fed'n, 72 N.Y.2d at 101.

In City of New York v. Rice, 198 N.Y. 124, 128 (1910), in affirming the lower court's injunction directing the defendant to remove decorative structures located in the street, the New York Court of Appeals held that the city held the public streets in trust. "The trust is *publici juris*, that is for the whole People of the state . . . There is no right in the city to use its property therein, as it might corporate property, nor otherwise than as the legislature may authorize for some public use, or benefit." Id.; see also Lyman v. Vill. of Potsdam, 228 N.Y. 398, 404 (1920) (finding that temporary obstructions located within village streets were permissible only " … provided … the obstructions are not in the nature of permanent structures or encroachments upon and appropriations of the land of the street for private benefit or use.").

Similarly, in Cohen v. City of New York, 113 N.Y. 532, 536 (1889), in finding that a municipality had no power to grant a license or permit to an individual for the private use of the street, the Court stated, " … a party cannot eke out the inconvenience of his own premises by taking in the public highway." In Thompson v. Orange & Rockland Elec. Co., 254 N.Y. 366, 369 (1930), the Court of appeals again held that when a municipality owned the fee to the streets "… such municipality may grant the use of the highway for any public or municipal purposes…"

In accordance with these precedents, the Attorney General in 1953 N.Y. Op Att'y Gen 35 found that a village could not allow receptacles within the street right-of-way to be used for bank deposits. In explaining his opinion, the Attorney General set forth the well established rule, "The general rule of law is that streets and public highways are held in trust for the public use. Accordingly, a municipality cannot convey or otherwise divert the same." Id.

New York's Village Law also governs this matter. The Verizon and LIPA utility poles in question are within the streets and subject to Village control under Village Law § 6-602. The term "street" as used in Village Law § 6-602 is not limited to the paved portion of the street. Village Law § 6-600 expressly distinguishes the term "street" from "paving," stating that the pavement is a term for the macadam or asphalt portion of the street. The word "street" includes all of the pavement as well as the grass shoulders and sidewalks. See Donnelly v. Vill. of Perry, 88 A.D.2d 764, 765, 451 N.Y.S.2d 494 (4th Dep't 1982). The portion of the street that is improved with utility poles is within the "street" as that term is used in Village Law §§ 6-600 and 6-602.

Since Westhampton Beach has exclusive control and supervision of the streets, it has a right to impose reasonable restrictions upon the use of the utility poles on those streets by LIPA and Verizon. In New Union Tel. Co. v. Marsh, 96 A.D. 122 (3d Dep't 1904) the Third Department stated:

> That the right by a telephone company to use the public streets and highways for its purposes is subject to the reasonable control, supervision and regulation by the authorities of the municipality in which such streets and highways are located, by virtue of and as part of the general police power is well settled.

Id.; see also New York Tel. Co. v. Town of N. Hempstead, 41 N.Y.2d 691, 696 (1977).

In New York Tel. Co. v. Town of N. Hempstead, both New York Telephone Company (Verizon's predecessor) and the Court acknowledged that the Town's police power allowed for reasonable regulations. Id. The Court of Appeals distinguished between a reasonable police power regulation of the poles and the situation before it, the Town's claim that it had the right to install electric street lights on the telephone poles without paying compensation. Id. In the present case, the utilities cite New York Tel. Co. v. Town of N. Hempstead as authority for the proposition that they have the power to sublicense their poles for the placement of private

religious items thereon, but the Court of Appeals never addressed an issue bearing any similarity to the EEEA sublicenses that the utilities here attempt. A case that holds that a Town, by unilateral demand, cannot compel itself to be a free rider on utility poles for a purpose unrelated to the utilities does not stand for the proposition that the utilities are free to allow private religious items on their public property-situated poles.

B. Under Transportation Corporations Law § 27, Verizon Lacks Authority to Issue Licenses for *Lechi* Attachment, a Private Use

Verizon claims that its authority to enter into the sublicensing agreement stems from Transportation Corporation Law § 27, which states, "Any such corporation may erect, construct and maintain the necessary fixtures for its lines … and may erect, construct and maintain its necessary stations, plants, equipment or lines … ." There is nothing in § 27 that permits Verizon to enter into a sublicense agreement with the EEEA, a private entity, to permit the EEEA to attach items to Verizon's utility poles for private religious purposes.

Indeed, Verizon's authority under § 27 must be read consistently with the definition of "telephone corporation" under N.Y. Transportation Corporations Law § 25 ("§ 25"), *i.e.*, "a corporation organized to construct, own, use and maintain a line or lines of electric telephone wholly within or partly without the state, or to acquire and own any interest in any such line or lines, or any grants therefor or for any or all of such purposes." To exercise authority under § 27, then, Verizon must be acting as a "telephone corporation" and for the purpose of providing telephone services, not for the purpose of lending those poles out for private use.

Verizon refers to Vill. of Carthage v. Cent. New York Tel. & Tel. Co., 185 N.Y. 448 (1906) for the proposition that its authority to issue licenses stems solely from § 27 and that § 27 provides authority for the unlimited the use of its poles. Not only does Carthage not support

Verizon's position, but the Court of Appeals subsequently criticized this decision twenty years later in New York Tel. Co. v. Bd. of Educ. of City of Elmira, 270 N.Y. 111, 118 (1936). In addition, the Carthage court found that the former Village Law § 89 - Village Law § 4-412 – permitted "… villages to regulate the erection of telegraph, telephone or electric poles." New York Telephone Company acknowledged its limited authority by, on several occasions, requesting permission from Westhampton Beach to install utility poles in the Village. See Exs. DD, EE.

Pursuant to its police power over the streets and utility poles in the Village, Westhampton Beach insists that Verizon use its facilities only for the purposes authorized by § 27, which only grants to Verizon a license to maintain its facilities in the streets of Westhampton Beach. See New York Tel. Co. v. Town of N. Hempstead, 41 N.Y.2d at 699-700; New York Tel. Co. v. City of Binghamton, 18 N.Y.2d 152, 162 (1966); Rochester Tel. Corp. v. Vill. of Fairport, 84 A.D.2d 455, 456 (4th Dep't 1982) ("the privilege, authorized by [Transportation Corporations Law, § 27 and Village Law § 4-412] grants the utility no property interest in the right of way, only a license to maintain its facilities there"). Since Verizon received only a license to construct its facilities in Westhampton Beach, the terms of Section 27 have to be strictly construed against Verizon. See Holmes Elec. Protective Co. v. Williams, 228 N.Y. 407, 447 (N.Y. 1920) ("The principle … is fundamental that 'every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the Public'"). Section 27 does not authorize sublicensing agreements with the private organizations to permit the placement of private objects on utility poles for private purposes. Therefore, Verizon has no authority to enter into such agreements, and Westhampton Beach, under its police power, has the right to insure that Verizon complies with the strict terms and conditions of § 27.

C. LIPA Lacks Statutory Authority to Issue Licenses for Lechi Attachment

LIPA's authority to operate in Westhampton Beach is based upon Transportation Corporation Law § 11 (3), which provides that an electric corporation can lay, erect, and construct wires, etc. in, on, and over the streets of towns and villages with the consent of the municipal authorities – here, Westhampton Beach. Long Island Lighting Company, LIPA's predecessor, has acknowledged the authority of Westhampton Beach, including a resolution by the Village's Board of Trustees authorizing the construction of an aerial power crossing over Quogue Canal and Jessup Lane. (Annexed to the declaration of Sokoloff is a copy of said agreement). Thus, LIPA does not have the statutory authority to unilaterally sublicense its poles for private use.

D. Verizon and LIPA Authority is Limited by Franchise Agreements That Govern the Utility Poles in Westhampton Beach

Verizon and LIPA's utility poles are subject to specific franchise agreements that limit their use of the public right-of-way for utility purposes only. These agreements do not permit the utilities to enter into sublicensing agreements with the EEEA to attach religious objects to the utility poles in Westhampton Beach for private purposes.

LIPA's poles are subject to franchise agreements dating back to 1910. Pursuant to the Transportation Corporation Law, in 1910, the Town Board of the Town of Southampton granted a franchise agreement to Riverhead Electric Light Company for the area west of Quantuck Creek. See Ex. V. In 1911, the Town Board of the Town of Southampton granted to Patchogue Electric Light Company a franchise for the area west of the Speonk River. See Ex. W. Based upon these franchises, Riverhead Electric Light Company's franchise covers the area of Westhampton Beach, as well as that part of the Town of Southampton that is proposed to be part

of the *eruv*. See Exs., V, W. Both agreements provided that the franchise could not be transferred without consent of the Town Board. Id.

In 1912, the Town Board consented to the transfer of the franchise from Riverhead Electric Light Company to either the Patchogue Electric Light Company or Suffolk Light Heat and Power Co. See Ex. X. In 1917, the Town Board approved the assignment of the franchise to Long Island Lighting Company. See Ex. Y. In 1964, the Town Board approved the transfer of the franchise from Patchogue Electric Light Company to Long Island Lighting Company. See Ex. Z.

The franchise agreement granted to Riverhead Electric Light Company, which was subsequently assigned to Long Island Lighting Company and which was subsequently assigned to LIPA, sets forth the authorization for the franchise. It states specifically that the franchise is for the " … the privilege and right to erect and maintain poles for the support of cross-arms, fixtures and wires and construct and maintain necessary pole lines for supplying electricity for heat, light and power to the inhabitants of said Town … ." See Exs. V-Y.

Verizon's poles are either subject to agreements that were never executed (and thus provide Verizon with not authority), or, as with LIPA, provide Verizon with limited authority that does not permit attachment of *lechis*. In November 1938, two months after the 1938 Hurricane destroyed most of the homes and other structures on Dune Road in Westhampton Beach,[4] the United States Coast Guard requested and received from the Village of Westhampton Beach a franchise to construct poles on Dune Road for the purpose of maintaining the circuits for the Coast Guard. See Ex. AA. The franchise agreement was subject to conditions, among them "… (2) Joint use of such poles by the New York Telephone Company and the Long Island

[4] The hurricane was the sixth most costly hurricane in 1998 dollars.
See, www2.sunysuffolk.edu/mandias/38hurricane

Lighting Company shall be permitted by the Coast Guard." See Ex. AA. Notably, by seeking out and entering into this agreement, the Coast Guard recognized Westhampton Beach's jurisdiction over the Dune Road location of the poles.

In 1952, at the request of the New York Telephone Company, the Village's Board of Trustees granted New York Telephone Company a franchise to take over and operate the poles on Dune Road. See Ex. BB. The 1952 Village Board resolution approving the transfer of the franchise indicates that it was subject to the Village Mayor's execution of a franchise agreement. New York Telephone Company never prepared such an agreement, and no franchise agreement was ever executed by the Mayor. Therefore, Verizon has no right to or interest in the utility poles on Dune Road and cannot enter into an agreement with the EEEA for the private use of the utility poles on Dune Road. See W. Side Elec. Co. v. Consol. Tel. & Elec. Subway Co., 110 A.D. 171, 177 (1st Dep't 1905) aff'd sub nom. People ex rel. W. Side Elec. Co. v. Consol. Tel. & Elec. Subway Co., 187 N.Y. 58 (1907). Alternatively, to the extent these agreements are valid, they do not permit Verizon now to enter into the sublicense agreement at issue, *i.e.*, one that allows the EEEA, a private entity, to attach anything to the Verizon utility poles for private purposes.

In Rhinehart v. Redfield, 93 A.D. 410, 414 (2d Dep't 1897) aff'd, 179 N.Y. 569 (1904), the Second Department stated:

> A franchise is a special privilege conferred by government … which does not belong to the citizens of a country generally by common right. … The grant of a franchise presupposes a benefit to the public and an equal right on the part of every member of such public … to participate in this benefit ….

In the present case, the franchise granted to LIPA in 1910, the franchise granted to Verizon by Transportation Law § 27, and the 1938 franchise granted to the Coast Guard were for

the public benefit of providing electricity and telephone services to the residents of Westhampton Beach. The utilities now propose to enter into sublicensing agreements with the EEEA to confer a private benefit on a private entity, *i.e.*, to confer the benefits of their interest in the public property to a few select members of a private religious group, as opposed to the residents in general, to use the public streets.

The law requires that the franchise agreements from which the utilities derive their power must be strictly construed. In Syracuse Water Co. v. City of Syracuse, 116 N.Y. 167, 178 (1889), the New York Court of Appeals, in holding that the water company did not have an exclusive right to supply water to the city, stated "… public grants are to be so strictly construed as to operate as a surrender by them of the sovereignty no further than is expressly declared by the language employed for the purpose of their creation. . . . The grantee takes nothing in that respect by inference." The Court went on to state that "such exclusive right in the grant of a public franchise cannot rest upon inference, presumption or doubtful construction." Id. at 185. See also W. Union Tel. Co. v. Elec. Light & Power Co. of Syracuse, 178 N.Y. 325, 331 (1904), ("The franchise 'is to be construed in the interest of the public, and hence in favor of the grantor and not, as in ordinary cases, in favor of the grantee'. . . . The plaintiff took nothing by its grant but what was expressly given…").

LIPA's authority to provide electric service in Westhampton Beach is based upon the 1910 franchise agreement with Riverhead Electric Company. Article 5 of the Public Authorities Law, which created LIPA, cannot alter or amend the 1910 franchise agreement, and the State legislation creating LIPA cannot divest Westhampton Beach of its rights under the 1910 franchise agreement. See Skaneateles Waterworks Co. v. Vill. of Skaneateles, 161 N.Y. 154, 166 (1899) aff'd, 184 U.S. 354 (1902).

Additionally, in construing the terms of the agreements and § 27 of the Transportation Corporation Law, the Court must consider the context in which the electric easement was issued in 1910, and the Transportation Corporation Law in effect at that time (more than 100 years ago), as well as the context in which the Village granted the franchise to the Coast Guard in 1938. See Filarsky v. Delia, 132 S. Ct. 1657 (2012).[5] At the turn of the century, the local municipalities were interested in providing electric and telephone service, as well as other utility services, to their residents; the Village is not aware of any interest in, or even discussion about, permitting private entities to use utility poles or attach items to utility poles for private purposes. In the case of LIPA, the grant was specific and limited, allowing LIPA only "to erect, maintain poles for the support of cross-arms, fixtures and wires and construct and maintain necessary pole lines for supplying electricity for heat, light and power to the inhabitants of the Town …." A *lechi* is none of these. Since this is the same language used by the Southampton Town Board one year later in 1911 when it granted the franchise to Patchogue Electric Light Company, there is nothing ambiguous in the grant, and it does not allow or permit LIPA to enter into a sub-license agreement with EEEA, a private entity to subvert the utility poles for private purposes.

As to Verizon, the law granted to telephone corporations the authority to "… erect, construct and maintain the necessary fixtures for its lines … and … erect, construct and maintain its necessary stations, plants, equipment or lines …." Transportation Corporation Law § 27. A *lechi* is none of them. More generally, there is nothing in this section that permits a private entity for private purposes to attach private items to the utility poles. Sec. 27 cannot be construed to allow either *lechis* or any private items for a private purpose. The statute allows

[5] In Filarsky v. Delia, __U.S.__, 132 S. Ct. 1657 (2012), the Supreme Court, in finding that a private attorney retained by a municipality has the same qualified immunity as a municipal employee, stated, "Understanding the protections the common law afforded to those exercising government power in 1871 requires an appreciation of the nature of government at that time." This Court should appreciate the nature of government in 1910 when the Riverhead franchise was executed and in 1938 and 1952 when the New York Telephone franchise was executed.

only attachments "necessary" to achieve Verizon's purpose, *i.e.*, providing telecommunications service to the public at large.

The Village issued the 1938 franchise agreement to the Coast Guard at a time when Dune Road had been destroyed by a hurricane and the Coast Guard sought to reestablish communication. Again there is nothing in this franchise agreement that would permit the Coast Guard or New York Telephone to allow a private entity for private purposes to attach private items to the utility poles. In addition, this agreement contained specific conditions, including "(2) Joint use of such poles by the New York Telephone Company and the Long Island Railroad Company shall be permitted by said Coast Guard." Westhampton Beach had the right and authority to impose such a limitation upon the grant of the franchise. See W. Union Tel. Co. v. City of Richmond, 224 U.S. 160, 168 (1912); Long Island Lighting Co. v. Shields, 274 A.D. 803 (2d Dep't 1948) aff'd, 299 N.Y. 562 (1949). Those limits set forth in the 1938 franchise prevent Verizon from entering into a sub-license agreement with EEEA, a private entity, to attach private items for private purposes on Dune Road.

The clear meaning of the franchise agreements and statutes limits the utilities to use their facilities for utility purposes only, to provide a public benefit for all residents. The utilities are not permitted to enter into sublicensing agreements to divert their facilities to a private benefit not shared by all residents. The franchise agreement with Riverhead Electric Light Company dates back more than 100 years, the provisions of the Transportation Corporation Law date back more than 100 years, and the franchise agreement with the Coast Guard date back more than 54 years. They clearly and unequivocally express the limits on the grants given to the utilities, and the utilities and EEEA are now precluded and estopped from attempting to reinterpret them in a

way that would allow them to attach *lechis* to their poles for a purely private purpose. See Vickery v. Vill. of Saugerties, 106 A.D.2d 721 (3d Dep't 1984) aff'd, 64 N.Y.2d 1161 (1985).

Based upon the foregoing, Verizon and LIPA's agreements with the EEEA are in violation of the franchise granted to the utilities and are unenforceable.

POINT II: VERIZON AND LIPA'S JOINT EFFORTS WITH THE EEEA TO ESTABLISH AN ERUV BY PLACING LECHIS ON PUBLIC UTILITY POLES VIOLATE THE ESTABLISHMENT CLAUSE

The Supreme Court has held that in, "cases involving facial challenges on Establishment Clause grounds, ... [the court] assess[es] the constitutionality of an enactment by reference to the three factors first articulated in Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S.Ct. 2135, 29 L.Ed.2d 745 (1971)." Commack Self-Serv. Kosher Meats, Inc. v. Weiss, 294 F.3d 415, 425 (2d Cir. 2002) citing Santa Fe Ind. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000). Thus, the Second Circuit "has regularly relied on Lemon in evaluating Establishment Clause challenges and only recently reiterated that 'the Lemon test continues to govern our analysis of Establishment Clause claims.'" Skoros v. City of New York, 437 F.3d 1, 58 (2d Cir. 2006) citing Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 634 (2d Cir. 2005).

The Lemon factors require that a challenged government act (1) have a valid secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive state entanglement with religion. Id. citing Lemon, 403 U.S. at 612-13. The courts treat the excessive entanglement prong as a part of the "inquiry into a statute's effect." Agostini v. Felton, 521 U.S. 203, 233 (1997); Commack Self-Serv. Kosher Meats, Inc. v. Hooker, 680 F.3d 194, 205 (2d Cir. 2012); DeStefano v. Emergency Hous. Grp., Inc., 247 F.3d 397, 406 (2d Cir. 2001). "Thus, when presented with Establishment Clause challenges, [the Court is] required

to ask whether the government acted with the purpose of advancing or inhibiting religion and whether the aid has the effect of advancing or inhibiting religion." Id.

A. The Creation of an Eruv is a Purely Religious Act with No Secular Purpose

"Under the Lemon standard, a court must invalidate a [state policy] if it lacks a secular legislative purpose." Santa Fe, 530 U.S. at 314 (quoting Lemon, 403 U.S. at 612). This test alone renders unconstitutional Verizon and LIPA's plan to allow religious attachments to its poles. Verizon and LIPA's plan to license their poles for the placement of *lechis* on public property lacks any secular purpose, and, instead is a purely religious act that benefits only certain religious Jews who believe that an *eruv* will advance their religious practices. Ex. H, ¶ 4; Ex. K, p. 24.

The *eruv* is a creature of Jewish religious law. It benefits only those Orthodox Jews who believe in its religious significance and effect. Ex. H, ¶ 4; Ex. K, p. 24. For those Jews, and only them, the *eruv* facilitates religious observance. Ex. T, ¶ 3; Ex. H, ¶ 7; Ex. J, ¶ 4. Its primary benefit and purpose is to help certain individuals overcome religiously-imposed bans on certain religious activities during Sabbath and on *Yom Kippur*. Id. Thus, Verizon and LIPA's plan to allow the EEEA to place *lechis* on utility poles furthers a purely religious purpose, the conversion of those poles into religious symbols that facilitate religious practice. Public utility poles can no more be diverted to such purely religious use than can a portion of a city hall be converted to a synagogue or can a public pool into a *mikveh* (ritual bath). The Constitutional offense is just as grave regardless of the size of the property diverted.

Indeed, this is not a case where Verizon and LIPA's advance of religion simply coincides with some secular purpose. McGowan v. State of Maryland, 366 U.S. 420, 444–45 (1961) (noting that, despite their religious origins, Sunday closing laws further the purpose of providing

a uniform day of rest for citizens). There is simply no secular purpose behind the attachment of visible *lechis* to utility poles. Those *lechis* and the *eruv* they are designed to comprise mean nothing to non-Jews, atheists, and nonobservant Jews. Their placement on public property is sought for one – and only one – purpose, a religious purpose, unique to a subset of Jews. See Ex. H, ¶ 4; Ex. K, p. 24. The plan, therefore, fails the Lemon test, and the Court must enjoin Verizon and LIPA from carrying it out.

B. The *Eruv's* Primary Effect is the Advancement of One Particular Set of Orthodox Jewish Beliefs and Practices

The second prong of the *Lemon* test requires that govern action not have the "principal or primary effect" of advancing or inhibiting religion. Commack, 294 F.3d at 430, quoting Lynch v. Donnelly, 465 U.S. 668, 612 (1984). The *eruv* fails this test, as well.

Here, the primary and direct effect of the attachment of *lechis* and establishment of an *eruv* is the advancement of plaintiffs' particular brand of religious Jewish observance. As set forth above, the *eruv*'s only significance is religious. The placement of *lechis* on public property-situated utility poles will have the effect of converting those poles into religious symbols that, together, make up an *eruv*. The *eruv* will, in turn, stand as a symbolic religious boundary that will facilitate religious practice by allowing some religious Jews to carry out some religious practices that their religion otherwise prohibits. See Ex. K, p. 178; Ex. H, ¶ 4; Ex. E, ¶ 6; Ex. F, ¶ 6. The only effect of the demarcation of an *eruv* is, thus, the facilitation and advancement one particular brand of Jewish religious beliefs and practices. See Ex. K, ¶ 14.

In Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 708-09 (1985), the Supreme Court struck down a statute that "decreed that those who observe a Sabbath any day of the week as a matter of religious conviction must be relieved of the duty to work on that day…." The Court

held the law violated the Establishment Clause because it had "a primary effect that impermissibly advances a particular religious practice." Id. Here, the proposed *eruv* has the same singularly religious effect: it advances the particular religious beliefs and practices of certain Orthodox Jews in helping those observant Jews to observe the Sabbath and Yom Kippur – days of purely religious significance.

The *eruv* also will use public property to endorse the EEEA's particular brand of Jewish religious observance. "In discussing the second prong of the Lemon test, the Supreme Court has warned that violation of the Establishment Clause can result from *perception* of endorsement. The Establishment Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief...." Bronx Household of Faith v. Bd. of Educ. of the City of N.Y., 650 F.3d 30, 40–41 (2d Cir. 2011). The endorsement inquiry is a "highly fact-specific test" that requires a court to ascertain whether "a reasonable observer of the display in its particular context [would] perceive a message of governmental endorsement or sponsorship of religion." Skoros v. City of New York, CV-02-6439 (CPS), 2004 WL 5570287 (E.D.N.Y. Feb. 18, 2004) aff'd, 437 F.3d 1 (2d Cir. 2006) citing Elewski v. City of Syracuse, 123 F.3d 51, 53 (2nd Cir. 1997); see also County of Allegheny v. American Civil Liberties Union, 492 U.S. 573, 593 (1989); Capital Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995). "The endorsement test necessarily focuses upon the perception of a reasonable, informed observer [who] must be deemed aware of the history and context of the community and forum in which the religious display appears." Skoros, 2004 WL 5570287 quoting Creatore v. Town of Trumbull, 68 F.3d 59, 61 (2d Cir.1995); Capitol Square, 515 U.S. at 773–74 (O'Connor, J., concurring in part and concurring in judgment)). This is "in large part a legal question to be answered on the basis of judicial interpretation of social facts." Elewski, 123 F.3d at 53–4

(quoting Lynch, 465 U.S. at 694 (opinion of O'Connor, J.)). Accordingly, "the endorsement inquiry is not about the perceptions of particular individuals or saving isolated nonadherents from the discomfort of viewing symbols of a faith to which they do not subscribe." Capital Square, 515 U.S. at 779 (O'Connor, J., concurring in part and concurring in judgment).

Here, a reasonably informed observer, acquainted with the religious significance of an *eruv*, the public debate surrounding the propriety of establishing an *eruv*, and its conversion of the public space into private religious domain, would find a government endorsement of the *eruv*. Verizon and LIPA's license of public property for a religious use is, in itself, an endorsement of religion, and, in particular, the religious practices of the EEEA's membership, which represents one specific subset of observant Jews. See Lamont v. Woods, 948 F.2d 825, 839–40 (2d Cir. 1991) (noting that the "message communicated by direct government funding" to foreign sectarian schools may offend the Establishment Clause). A reasonable observer is bound to interpret LIPA's (and Verizon's) agreement with the EEEA, issuance of licenses to the EEEA, and pursuit of litigation on behalf of the EEEA and against the municipalities as an endorsement of – and even a full-blown campaign for – a specific brand of Jewish Orthodoxy and its beliefs about Sabbath observance.[6]

Telephone poles with *lechis* attached on would be a physical manifestation of this endorsement – a constant visible reminder to passersby that Verizon and LIPA have set aside their utility poles as markers of and boundaries for a religious area.

[6] Plaintiffs' argument, and that of the EEEA, equates the religious message of a *lechi* or an *eruv* with the ultra high pitch of a dog whistle: only the intended recipient can hear it. The case law makes clear that this Court, in deciding this issue before it, must presume that the population at large can hear the *lechi*'s message: "The endorsement test necessarily focuses upon the perception *of a reasonable, informed observer [who] must be deemed aware of the history and context of the community and forum in which the religious display appears*." (Emphasis added). Skoros, 2004 WL 5570287 quoting Creatore v. Town of Trumbull, 68 F.3d 59, 61 (2d Cir.1995); Capitol Square, 515 U.S. at 773–74 (O'Connor, J., concurring in part and concurring in judgment)).

The *lechis* would also create the impression that LIPA and the Village – the municipality with jurisdiction over the public areas and rights of way on which the *lechis* stand – have placed their stamp of approval on the placement of the *lechis* and the consequent conversion of Village public spaces to religious domain. See Parents' Ass'n of P.S. 16 v. Quinones, 803 F.2d 1235, 1241 (2d Cir.1986) (perception of endorsement when, *inter alia,* female Hasidic children were taught in classrooms that only they could use and that non-Hasidic children could not use, Yiddish was spoken in those classrooms, and a partition was erected to physically separate the Hasidic girls from the remainder of the school population). In this way, the *lechis* would send the message that the Village has placed its imprimatur on Judaism as the preferred religion in its jurisdiction, or on the EEEA's brand of Orthodox Judaism as preferable to other forms of Judaic belief and practice.[7] The *eruv* would create the impression that governmental authorities have singled out this particular form of Judaism for special and preferential treatment. "The touchstone for [Establishment Clause analysis] is the principle that the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." McCreary County v. Am. Civil Liberties Union, 545 U.S. 844, 860 (2005).

To the observant religious Jews who believe in the religious effect of the *eruv* and in the message that the *eruv* conveys, the placement of *lechis* on public utility poles would signal the borders of the religious domain and what they may and may not do within those borders. See Ex. H, ¶ 4; Ex. E, ¶ 6; Ex. F, ¶ 6.

[7] Indeed, some Jewish residents of Westhampton Beach have already interpreted Verizon and LIPA's actions as an endorsement of one specific view of religious Jewish observance that is contrary to their own. The Jewish People for the Betterment of Westhampton Beach (a/k/a "JPOE") have brought an action against the Village, EEEA, Verizon, and LIPA, challenging the proposed eruv on Establishment Clause grounds. In that suit, they contend that "Many Jews reject the very concept of an *eruv*, and sincerely believe that the particular form of Jewish belief and observance that elevates legalist constructs over the true spiritual values of Judaism and the Sabbath is abhorrent to their own religious views and interpretation of Jewish law." Ex. G, ¶ 3, (JPOE Complaint).

In essence, by setting aside certain rabbi-selected utility poles and allowing them to be converted into religious symbols that delineate a religious-defined religious area, Verizon and LIPA would be establishing a religiously-defined ghetto approximately coterminous with the boundaries of the Village. The Supreme Court struck down a similar enactment in Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994), where New York State attempted to accommodate the religious beliefs of Satmar Hassidic Jews by creating a school district with a border that traced, enclosed, and set apart the Hassidic community. The Supreme Court struck down government participation in this religious line-drawing as violating the "general principle that civil power must be exercised in a manner neutral to religion." Id. at 704. LIPA and Verizon's intended line-drawing must fail for the same reason.

LIPA and Verizon should not be permitted to exercise its civil power to draw a religious boundary that favors one particular sect of religious Jews. As in Grumet, "Here the benefit flows only to a single sect, but aiding this single, small religious group causes no less a constitutional problem than would follow from aiding a sect with more members or religion as a whole." Id. at 705. The same is true in this case; LIPA's (and Verizon's) plan must fail as an unconstitutional endorsement of religion.

C. The Eruv Excessively Entangles the Government With Religion

The third prong of the Lemon test demands that government policy not "foster an excessive ... entanglement with religion." Lemon, 403 U.S. at 613. The Supreme Court has explained that the Framers understood the First Amendment's prohibition on laws "respecting an establishment of religion" to preclude government "sponsorship [of religion], financial support [for religion], [or the] active involvement of the sovereign in religious activity," Walz v. Tax Commission, 397 U.S. 664, 668 (1970) (emphasis supplied). Like the Establishment Clause

generally, the prohibition on excessive government entanglement with religion "rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Illinois ex rel. McCollum v. Bd. of Educ., 333 U.S. 203, 212 (1948). In evaluating whether church-state entanglement is excessive, the Supreme Court has "looked to the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority .... Similarly, [the Court has] assessed a law's effect by examining the character of the institutions benefited ... and the nature of the aid that the State provided ...." Agostini v. Felton, 521 U.S. 203, 232 (1997) (citations omitted; internal quotation marks omitted).

Here, the EEEA seeks to use public property for an exclusively religious purpose, to make semi-permanent attachments of purely religious significance to public utility poles on public lands, and all in order to convert public space into religious space. The entanglement here is not only merely figurative; it is literal. The lechi – 15-foot PVC staves of purely religious significance – will be attached to and made a part of the public utility poles. In this way, the religious will literally blend with the public, transforming public utility poles into religion symbols and implements. The *lechi* on public property is no less visible and meaningful a governmental endorsement of religion than would be a cross on Village Hall.

Further, in licensing its telephone poles for the creation of an *eruv*, the utilities – and LIPA in particular since it is a governmental agency – will be using public resources to advance the religious goals of the EEEA, an organization and operating for purely religious purposes – and its religious constituency. The result will be an ongoing contractual relationship between LIPA, a government agency, and EEEA, a religious institution, whereby LIPA will continuously

provide public resources for the purely religious benefit of the EEEA, its religious membership, and certain religious Jews in the area. See Agostini, 521 U.S. at 203 (holding that federal program wherein government employees taught classes in sectarian schools constituted impermissible entanglement between church and state); Lemon, 403 U.S. at 602 (Pennsylvania statute providing state funding for parochial schools violated Establishment Clause). This creates an unconstitutional entanglement with religion that is prohibited by the Establishment Clause.[8]

This case is not about whether Orthodox Jews are free to create an *eruv* in the United States, in New York State, or even in Westhampton Beach. Observant Jews desiring to live on land bounded by an *eruv* are free to purchase, rent, or otherwise acquire the right to use private property and to place *lechis* and wires on that private property sufficient to surround an area with an *eruv*. The Establishment Clause would have nothing to say about it.

This case is much narrower than that. This case concerns whether a sect of Orthodox Jews can take tracts of *public* property licensed to utilities for the provision of electric and telecommunications services for the public and affix attachments to them that have a purely religious message. If this Court allows *lechis* on utility poles on public property, it would have no basis to say no to crucifixes on those same utility poles. To both the Establishment Clause says "no."

[8] If a *lechi* falls on someone, or, if it sticks out in a way that causes personal injury to a passer-by, is the Village to be responsible for the injury on public property? Does the Village have a non-delegable duty to keep public property free from hazards? If a *lechi* is affixed in a way that the Village deems potentially unsafe (because unforeseen accidents *can* happen, which is why they are called accidents), must the Village inspectors sit down with the rabbis to come up with a way that the *lechi* can be reconfigured in a way that gets the rabbi's blessing? These examples are but a few of the types of entanglements that are foreseeable given the plaintiffs' plan to allow *lechis* on public property.

POINT III: THE COURT SHOULD ISSUE A PRELIMINARY INJUNCTION, ENJOINING VERIZON AND LIPA FROM ISSUING LICENSES FOR THE ATTACHMENT OF LECHIS

A party seeking a preliminary injunction must demonstrate that it will suffer irreparable harm absent injunctive relief and either (1) that it is likely to succeed on the merits of the action, or (2) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, provided that the balance of hardships tips decidedly in favor of the moving party. Mullins v. City of New York, 626 F.3d 47, 52-53 (2d Cir. 2010). When a party seeks an injunction that will affect governmental action taken in the public interest pursuant to a statutory or regulatory scheme, the plaintiff must typically show a likelihood of success on the merits. Id. citing Monserrate v. N.Y. State Senate, 599 F.3d 148, 154 (2d Cir. 2010).

"[A] party alleging a violation of the Establishment Clause per se satisfies the irreparable injury requirement of the preliminary injunction calculus. Chaplaincy of Full Gospel Churches v. England, 454 F.3d 290, 304 (D.C. Cir. 2006). This is because "the harm inflicted by religious establishment is self-executing and requires no attendant conduct on the part of the individual." Id. at 303. "The harm is irreparable as well as substantial because an erosion of religious liberties cannot be deterred by awarding damages to the victims of such erosion; most of those victims do not even have standing to sue." Am. Civil Liberties Union of Illinois v. City of St. Charles, 794 F.2d 265, 275 (7th Cir. 1986). The Village alleges that Verizon and LIPA's erection of *lechis* on public utility poles would violate the Establishment Clause. It, therefore, satisfies that irreparable injury requirement.

The Village satisfies the second requirement as well. Here, the less stringent "serious questions going to the merits" test should apply. Although Verizon is a public utility that seeks to use public property for a private purpose, it is not strictly a government actor. And while LIPA is a government actor, it is seeking to act outside its statutory authority, which requires that

LIPA provide electric power and does not allow LIPA to divert public property to private and religious use. Thus neither Verizon nor LIPA may invoke the "likelihood of success" standard.

In any event, as set more fully above the Village is likely to succeed both on its Establishment Clause claim and its claim that Verizon and LIPA lack authority to issue licenses to EEEA. At the very least, the Village has set forth sufficiently serious questions going to the merits of these claims.

Verizon has indicated that, in the event the Court does not issue a preliminary injunction, it will proceed to allow the placement of *lechis* on its public utility poles. While LIPA has not expressed the same intent, it also has not specifically indicated that it will refrain from issuing such licenses. As such, both Verizon and LIPA should be enjoined from acting outside their authority and violating the Establishment Clause at least to maintain the status quo pending a decision on this motion.

CONCLUSION

For all the foregoing reasons, this Court should (1) grant the Village's motion for summary judgment, declaring that Verizon and LIPA's plan to allow the placement *lechis* on their utility poles is outside their legal authority and violates the Establishment Clause of First Amendment; (2) grant the Village's motion for a preliminary injunction, barring Verizon and LIPA from issuing the licenses while this action is pending; and (3) dismiss this action in its entirety, with costs, disbursements, and such other and further relief as to this Court is just, proper, and equitable.

Dated: Westbury, New York
August 22, 2012

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